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Supreme Court, U.S.
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No. 96-1813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IBP, INC. AND DIANE ARNDT,

Petitioners,

v.

KEVIN WILSON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

REPLY MEMORANDUM

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REPLY MEMORANDUM

Petitioners IBP, inc. ("IBP") and Diane Arndt respectfully file this memorandum in reply to respondent's Brief in Opposition ("Opp.") to certiorari.[1]

In their petition ("Pet."), IBP and Ms. Arndt demonstrated that the decision of the Iowa Supreme Court to levy a $2 million fine to punish conduct that caused $4,000 in presumed harm -- the exact 500-1 ratio struck down as unconstitutional in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996) -- plainly violates the Due Process Clause of the Fourteenth Amendment as interpreted by this Court in *BMW* and should be summarily reversed. Petitioners also showed that the Court should grant plenary review to decide whether the award violates the Due Process Clause of the Fourteenth Amendment because a private plaintiff has pursued punitive damages on behalf of the State. Although respondent asserts that IBP "does nothing more than dispute how the Supreme Court of Iowa found facts and applied [*BMW*]," Opp. at 7, the facts as recounted by respondent himself illustrate that the Iowa Supreme Court's decision to increase the punishment in this case from the $100,000 approved by the trial court to $2 million was in flagrant disregard of this Court's

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[1] On May 27, 1997, IBP filed a notice of appeal from the judgment entered by the trial court on remand. That appeal does not affect the finality of the Iowa Supreme Court judgment at issue in the petition, because it only involves pre-judgment interest determinations made by the trial court on remand. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975)

constitutional guidance in *BMW*. The Iowa court's failure faithfully to apply *BMW* to this case constituted the kind of "palpably clear . . . constitutional error" that justifies summary reversal. *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting). Respondent likewise offers no substantive argument in support of the constitutionality of Iowa's private prosecutor law, incorrectly asserting that petitioners did not preserve this due process challenge.

1. The reprehensibility of the conduct at issue in this case did not provide IBP with notice that the State of Iowa might impose a multimillion dollar penalty. Indeed, respondent totally ignores -- and therefore does not dispute -- the fact that this punitive damage award is the highest ever affirmed by an Iowa court in a reported decision and that the previous highest award was in a personal injury case where the plaintiff died and where compensatory damages were more than $1.4 million. *See* Pet. at 14 (citing *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 857 (Iowa 1994)). More to the point, respondent fails to justify the Iowa Supreme Court's complete failure to compare the reprehensibility of the conduct in this case to other conduct for which punishment may be imposed, as it was required to do by *BMW*. *See BMW*, 116 S. Ct. at 1601. Although the Iowa court apparently concluded that IBP's conduct was reprehensible, it failed to follow *BMW*'s guidance by not calibrating the *degree* of reprehensibility in light of other punishable conduct. As a consequence, the court rendered "'reprehensibility' a concept without constraining force." *BMW*, 116 S. Ct. at 1606 (Breyer, J., concurring).

In an attempt to compensate for the Iowa court's failure to make such a reprehensibility comparison, respondent purports to compare the reprehensibility of IBP's conduct to

the conduct at issue in *BMW*, claiming that "[i]n every way [in] which BMW's conduct could be characterized as less wrongful, IBP's is more so." Opp. at 9. Even assuming for argument's sake that IBP's conduct is more reprehensible than was BMW's, that assumption hardly supports a $2 million penalty. This Court, of course, struck down the $2 million penalty in *BMW* as being unconstitutionally excessive. After reconsidering the facts of *BMW* in light of this Court's guidance, the Alabama Supreme Court concluded on remand that the constitutionally acceptable punishment for BMW's conduct was $50,000. *BMW of N. Am., Inc. v. Gore*, No. 1920324, 1997 WL 233910, at *16 (Ala. May 9, 1997). Thus, even if IBP's conduct could be said to be twice as reprehensible as BMW's conduct -- which is a stretch -- it would only merit a $100,000 punishment -- which was, incidentally, the remittitur ordered by the trial court in this case. Under no circumstances, however, can the reprehensibility of the conduct here justify a $2 million penalty, a conclusion that the Iowa court surely would have reached if it had faithfully applied *BMW*.

2. In an effort to heighten the level of reprehensibility, respondent strains mightily to assert that IBP's conduct endangered Mr. Wilson's health and safety. There in fact was no evidence -- and respondent points to none -- that Mr. Wilson suffered any physical harm from the conduct at issue in this case,[2] that any medical care that he received

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[2] Indeed, respondent asserts that "IBP caused physical harm in the manipulation of the medical care provided Wilson by delaying his needed back surgery." Opp. at 10. Not only does respondent fail to provide any citation to support this assertion (because it is totally unsupported by the evidence), he is forced to admit in the very next sentence that "his disc did *not* rupture

was below the standard of care, that he had been denied any workers' compensation benefits, that any other employee of IBP ever had suffered physical harm as a result of the conduct at issue in this case (or even as a result of similar conduct), or that any other employee ever had received medical care that was below the standard of care as a result of the company's workers compensation policies. The sum total of the conduct at issue in this case -- for which the Iowa Supreme Court imposed a $2 million fine -- was that Ms. Arndt allegedly defamed Mr. Wilson to one of his treating physicians, causing $4,000 in presumed damages to Mr. Wilson's reputation, and that this defamation allegedly was a product of a (completely lawful) "climate of suspicion" of injured workers' claims said to exist at IBP. Neither respondent nor the Iowa Supreme Court has reconciled the reprehensibility of this conduct with a $2 million penalty.[3]

3. Similarly unavailing is respondent's attempt (Opp. at 15) to excuse the Iowa court's dismissal of the second *BMW* guidepost -- ratio of punitive damages to actual harm -- as being "[o]f minor significance." Indeed, both cases that respondent cites in his effort to justify the 500-1 ratio in this case actually demonstrate the Iowa court's palpable

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further and cause more neurological problems." *Id.* (emphasis added).

[3] Respondent asserts that IBP employees falsified OSHA records, but there was no evidence that any record pertaining to Mr. Wilson was falsified, that he suffered any harm from any such alleged falsification or that any other worker suffered any harm as a result of such purported conduct. Moreover, the maximum criminal fine for such an act -- assuming for argument's sake that IBP could even be punished for it in this case -- is $10,000. 29 U.S.C. § 666(g).

error in refusing to accord weight to this factor. Respondent invokes the Seventh Circuit's opinion approving a $60,000 punishment where compensatory damages amounted to $5,000. Opp. at 13-14 (citing *Cooper v. Casey*, 97 F.3d 914, 919-20 (7th Cir. 1996)). This result obviously reinforces petitioners' fundamental point: an award of $2 million is grossly out of proportion to (presumed) actual harm of $4,000; an award of $60,000 would be within a constitutionally acceptable range. Respondent's reliance on *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), is also misplaced. *See* Opp. at 14. In *Lee*, the actual damages were only nominal, leading the Second Circuit to conclude that use of a multiplier was not meaningful. *Lee*, 101 F.3d at 811. Thus, the court looked to punitive damage awards in similar cases "to find limits and proportions" and concluded that $125,000 was the appropriate punishment. As pointed out above, neither the Iowa court nor respondent pointed to any comparable Iowa case in which a multimillion dollar punishment was imposed. Moreover, *Lee* illustrates that the appropriate magnitude for punishment in cases where actual damages are nominal (or, as in this case, de minimis) is in the tens of thousands, *not* in the millions.

4. The Iowa Supreme Court did not even mention the third *BMW* guidepost: comparison to legislatively established penalties. Respondent himself attempts to avoid the guidepost by asserting that "the conduct at issue is not covered by any statutory measure." Opp. at 15. This assertion simply misses the point that in Iowa, a corporation that commits a serious misdemeanor causing $4,000 in harm faces a maximum fine of less than $10,000, while IBP, which committed no crime whatsoever, is being fined $2 million. There is no provision anywhere in the law of Iowa that put IBP on notice that it could be fined $2 million for the conduct at issue in this case, and the complete

failure of the Iowa Supreme Court to take that lack of notice into account in assessing punitive damages in this case illustrates its flagrant disregard for the constitutional guidance articulated by this Court in *BMW*.

5. Respondent makes no argument whatsoever on the merits of Question 2 of the Petition, resting instead on the claim that petitioners did not preserve their due process claim. First, the Iowa Supreme Court specifically (though inadequately) addressed the constitutionality of the punishment under the Due Process Clause in its opinion. Appendix to the Petition ("App.") at 24a. "There can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). Moreover, petitioners vigorously argued in their petition for rehearing that the Iowa Supreme Court's decision to disapprove the $100,000 remittitur ordered by the trial court and to assess instead a $2 million penalty violated the Due Process Clause. *See* Appellees/Cross-Appellants' Petition for Rehearing 6-9 (arguing that the supreme court's "ruling denies IBP due process of law under the Fourteenth Amendment of the United States Constitution").

Respondent appears to confuse a due process "claim" with the particular "arguments" made in support of such a claim. On this point, respondent seeks support from *Yee v. City of Escondido*, 503 U.S. 519 (1992), but *Yee* directly supports petitioners. In *Yee*, this Court would not consider whether a statute denied substantive due process because "petitioners did not raise a substantive due process *claim* in the state courts, and no state court has addressed such a *claim*." *Id.* at 533 (emphasis added). But the *Yee Court* also expressly recognized that "[o]nce a federal claim is properly presented, a party can make *any argument* in

support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534 (emphasis added).

In this case, petitioners clearly raised a due process claim before the Iowa Supreme Court. Question 2 simply sets forth another argument in support of that claim and it is properly before this Court.[4]

CONCLUSION

The Iowa Supreme Court was obligated faithfully to apply this Court's guidance in *BMW* to this case, an obligation that it manifestly failed to fulfill. The petition for a writ of certiorari therefore should be granted and the case either summarily reversed in light of *BMW* or set for plenary consideration.

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[4] Respondent faults petitioners for stating in the Question Presented that "the State collects a 75 percent share of the punishment and pays the plaintiff's attorney's fees out of the punishment." Opp. at 24. This criticism is unfounded, given that respondent's counsel specifically argued to the jury when seeking punitive damages that 75 percent of the punitive award would go to the State. (Tr. 336)

June 25, 1997

Respectfully submitted,

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